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LEGAL DEVELOPMENT IN ENGLAND AFTER THE RESTORATION

Some little time ago I was talking to an eminent historian who was lamenting that the English lawyers who had interested themselves in the history and development of legal ideas and legal procedure in this country had, mostly, set a limit for their investigations at about the time of the Civil War, whereas, said he, it would be most important for historians to have the process completed up to modern times. He said that no one had taken the trouble to investigate what kind of matters chiefly came before the courts after the Restoration, how they were dealt with, or how the legal ideas governing the decisions of the courts developed from that date. I acknowledged the justice of the criticism, and during part of the Long Vacation I amused myself by going through the reports of Sir T. Raymond and Levinz, which are the King's Bench Reports from the Restoration to the end of the reign of William and Mary, and making an analysis of the subjects with which the various decisions dealt.¹

¹ The following is, roughly, the result:

64 cases dealt with criminal or quasi-criminal matters; 26 with technical questions on error; 19 with *mandamus*; 45 with prohibition; 5 with *certiorari*; 1

There are about twelve hundred decisions in all, and the first thing that is noticeable about the list is the comparative dearth of actions in relation to commercial matters. It is not that such matters are ignored. On the contrary, almost every kind of commercial transaction is incidentally referred to somewhere.

Woodward v. Bonithan, Sir T. R. 3, is an application for a prohibition to the Court of Admiralty, to restrain them from dealing with an action upon an agreement for the hire of a ship, on the ground that the agreement was made on land.

Graves v. Sawcer, Sir T. R. 15, is an action by one part owner of a ship against another for fraudulently selling her abroad.

Eliot v. Blake, Sir T. R. 65, is an action in which a question is raised as to the exception of "perils of the sea" in a contract for the sale and delivery of goods.

Mors v. Slue, Sir T. R. 220, is an action on the case

with *habeas corpus*; 1 with *quo warranto*; 14 with *scire facias*; 4 with *qui tam*; 1 with *latitat*; 1 with *audita querela*; 6 with duty of sheriff; 12 with escape; 3 with rescue; 1 with hue and cry; 1 with sureties; 21 with bail; 4 with forcible entry; 2 with contempt of court; 5 with outlawry; 40 with questions of pleading; 16 with questions as to trial of actions; 2 with form of writs; 2 with evidence; 1 with writ of inquiry; 3 with execution and process; 1 with attachment; 6 with abatement; 3 with damages; 2 with wager of law; 5 with questions about jurors; 5 with bankruptcy; 2 with satisfaction of judgments; 2 with costs; 2 with accord and satisfaction; 2 with estoppel; 4 with release; 7 with privilege from arrest; 1 with privilege of Parliament; 4 with assize for office; 2 with Courts of Honour; 7 with customs and bye-laws of towns; 2 with charitable trusts; 11 with apprenticeship; 1 with extortion by jailor; 1 with constitutional law; 1 with revenue; 2 with royal grants and charters; 1 with poor law; 6 with ecclesiastical law; 3 with husband and wife; 1 with jointure; 10 with dower; 8 with infancy; 32 with actions on awards; 95 with ejectment; 29 with replevin; 2 with wrongful distress; 32 with rent; 30 with manors and copyholds; 8 with tithes; 36 with trespass to land; 50 with covenants relating to land; 18 with devises of land; 4 with attornment; 20 with cases relating to estates in land; 1 with parcels; 4 with formedon; 2 with partition of lands; 2 with prescription as to lands; 3 with nuisance; 1 with ancient lights; 3 with ways; 1 with watercourses; 3 with highways; 3 with waste; 1 with common recovery; 8 with statutes of limitation; 3 with use and occupation; 62 with debt; 55 with *assumpsit* (except in cases otherwise specified); 2 with account; 4 with conditions in bond; 22 with cases connected with shipping (charter-party, bottomry, etc.); 7 with actions on wagers; 6 with sale of goods; 5 with marriage brokerage; 2 with breach of promise of marriage; 2 with bills of exchange; 2 with *quantum meruit*; 25 with trover; 66 with slander; 1 with libel; 18 with trespass to goods; 19 with trespass to person; 41 with trespass on the case (for matters other than those specified); 2 with personal negligence; 1 with deceit; and 49 with actions by and against executors.

against the master of a general ship for goods stolen when on board.

Mustard v. Harnden, Sir T. R. 390, is an action for damages for negligence causing a collision in the River Thames.

Hughs v. Cornelius, Sir T. R. 473, is an action of trover for a ship condemned as a prize. Question as to whether judgment of a foreign prize court is final.

Sands v. Exton, Sir T. R. 488. Prohibition to the Admiralty Court in reference to the arrest of a ship sailing to the East Indies contrary to the East India Company's charter.

Sayer v. Glean, 1 Lev. 54. Action on bottomry bill.

Collins v. Sutton, 1 Lev. 149. Action on bottomry bond.

Stone v. Waddington, 1 Lev. 156. Action for goods sold and delivered.

Anon., 1 Lev. 166. *Assumpsit* for price of goods sold and delivered.

Hussy v. Pacy, 1 Lev. 188. Action for breach of covenant not to import certain goods.

Jurado v. Gregory, 1 Lev. 267. Prohibition to the Admiralty with reference to a contract at Malaga to load goods there.

Brown v. London, 1 Lev. 298. *Assumpsit* on the custom of merchants by drawer against acceptor of a bill of exchange.

Martin v. Delboe, 1 Lev. 298. Statutes of limitation not pleadable on accounts stated between merchants.

Watton v. Weddington, 2 Lev. 7. Action on bottomry bond.

Ridly v. Egglesfield, 2 Lev. 25. Case for suing in the Admiralty in respect of ship taken by pirates.

Bolton v. Lee, 2 Lev. 56. Covenant upon a charter party.

Cooker v. Child, 2 Lev. 74. Debt upon an indenture of charter party.

Rea v. Barnes, 2 Lev. 117. Debt upon a charter party.

Burdet v. Thrule, 2 Lev. 126. Action for account by merchant against factor.

Fowk v. Pinsacke, 2 Lev. 153. *Assumpsit* for premium on policy of marine insurance.

Hall v. Huffam, 2 Lev. 188, 228. *Assumpsit* for price of goods sold.

Cole v. Shallet, 3 Lev. 41. Covenant on charter party.

Coke v. Cretchet, 3 Lev. 60. Prohibition to stay suit in Admiralty for mariner's wages.

Boson v. Sandford, 3 Lev. 258. Case against the proprietors of a general ship for damage to cargo.

Kempe v. Andrews, 3 Lev. 291. Trover for ship af-freightment.

Horton v. Coggs, 3 Lev. 296. Case on the custom of London, to pay note payable to bearer.

Keech v. Knight, 3 Lev. 315. *Assumpsit* on sale of a vessel.

Jeffery v. Legender, 3 Lev. 320. *Assumpsit* on a policy of marine insurance.

These thirty cases are the only cases in all this period in which commercial matters are dealt with at all—in many of them only incidentally. They serve to shew, however, that the commercial community was alive, was chartering and insuring ships, selling goods at home and abroad, dealing in bills of exchange and the like, much as their successors have done. There must have been thousands of such transactions. How comes it that they occupied the attention of the King's Courts so little? It is often said that there was practically no commercial law before the time of Lord Mansfield, and that it was his ordering and exposition of that law which induced suitors to come into the Courts.²

I doubt very much if this is the true explanation. Contracts very similar to the modern contracts of affreightment, insurance, negotiable instruments, *etc.*, and the well known mercantile rules applying to them, had been known and must have been constantly acted upon amongst merchants for a thousand years. When we do get a glimpse of such transactions, during the period in question, they do not assume any questionable shape, but are spoken of by the Law Reporters as if everyone understood them. After all,

² In his well known judgment in *Lickbarrow v. Mason*, 2 T. R. 63 (1786) Buller, J., says:

"We find in *Snee v. Prescott* that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time, we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country."

Lord Mansfield's work was mainly equivalent to a codification of mercantile rules which had been understood and acted upon for centuries. Litigants do not, as a rule, care whether they are establishing a precedent or not. A mercantile jury is by no means a bad tribunal for deciding a mercantile case, and one would have thought that the more the law was systematized and reduced to rules quotable as precedents, the less litigation there would be. Otherwise codification of the law is of very doubtful utility.

I cannot help fancying that the true reason for the lack of commercial cases in the Supreme Court must have been that the merchants found that they could get their disputes settled elsewhere much more expeditiously and cheaply, and without the risk of defeat upon technicalities or the necessity of submitting to antediluvian forms of trial, which were the curses of the High Court. In the first place, it is evident from the large number of cases of error from and prohibition to the local Courts of Record that those Courts enjoyed a popularity which has long since waned. It would be interesting to examine the records of the Tolsey Court at Bristol, for instance, if they exist, and find out what class of cases were then being dealt with, and what number of them. The local courts must have been much less expensive than the High Court and much more speedy; and the suitors possessed in the old practice of foreign attachment³, a means of compelling the submission to the jurisdiction of the Court and of obtaining the fruits of their judgments, which the High Court did not possess. At any rate it is evident from the reports of Raymond and Levinz that these local Courts were much more active in their time than they afterward became.

Secondly, it is noticeable that during the period in question there are no less than thirty-two decisions upon matters arising out of arbitrations. This is a very large proportion. We are accustomed to think and say, today, that commercial business has deserted the Law Courts in favor of arbitration. I fancy that in the period with which we are dealing this must have been even more the case.

The next point that calls for attention in the list is that, although there are no less than 66 actions for slander, there is only

³ See *Mayor of London v. Cox*, (1866) L. R. 2 H. L. 239.

one single case of libel. I imagine that, at this date, libel was practically always dealt with as a criminal and not as a civil matter.⁴

⁴ This question as to how and when the High Court in England came to deal with actions for defamation is rather perplexing. Under the Statutes *Circumspecte Agatis* (1285, 13 Edw. I) and *Articuli Cleri* (1315-1316, 9 Edw. II) jurisdiction in cases of defamation is clearly reserved to the Ecclesiastical Courts. Nevertheless, at a very early date, the local Manorial Courts seem to have entertained suits for defamation, sometimes as a penal, and sometimes as a civil matter (Holdsworth, Vol. II, pp. 319 *et seq.*). But, as far as present research has gone, all the cases dealt with seem to have been for oral defamation, or slander.

At some period which is uncertain, but which is generally supposed to date from the weakening of the Ecclesiastical Courts from the Reformation, the King's Courts accepted jurisdiction to deal with oral defamation. The Ecclesiastical Courts continued, however, for centuries, to retain a jurisdiction to deal with cases of defamation which were not actionable at Common Law, as for mere abuse, calling a woman "a whore" and the like, and the books are full of cases where prohibition was applied for to prevent them from exceeding their jurisdiction in this respect. At any rate, from the beginning of the Elizabethan Reports, Coke, Croke, Yelverton, etc., the Law Reports are full of cases of slander, mostly of the most trumpery description. At about the same time the Star Chamber seems to have undertaken to deal with cases of libel, but solely from a penal point of view.

Actions for libel in the High Courts, however, are practically non-existent. I have searched both King's Bench and Common Bench Reports from Elizabethan times down to the end of Modern Reports, which takes us well into the reign of George the Second. In all that period, though there are several cases referring to indictments, informations or penal bills for libel in the King's Courts or the Star Chamber, I have found only three cases of civil actions for libel, *viz.*, *Eyres v. Sedgewicke*, Cro. Jac. 601 (18 Jac. I); *Lake v. King*, 1 Lev. 139 (20 Car. II); and an *Anonymous Case*, 11 Mod. 99 (5 Anne). It is noticeable that the first of these cases was for making a false affidavit in Chancery by reason of which the plaintiff was imprisoned; and the second was for presenting a false petition to Parliament accusing the plaintiff of malversation in his office of Vicar-General. The last of the three cases alone was an ordinary straightforward libel of the modern kind. During all this period the books are full of cases of oral defamation.

This is not altogether easy of explanation. It seems plain that the King's Courts had jurisdiction to try ordinary cases of libel. In the case of *Peacock v. Reynal* (10 Jac. I, 1612), reported in 2 Brownlow & Goldsborough 152, which appears to be a report of proceedings in the Star Chamber, after stating the nature of the libel alleged in the bill of the plaintiff exhibited in the Star Chamber, the report proceeds: "And it was agreed that this was a libel, and for that the Defendant was fined to £200 and imprisonment according to the course of the court, and the Plaintiff let loose to the common law for his recompense for the damages he hath sustained."

It is probable that in some cases a cause of action which we should now call an action for libel was wrapped up in an action on the case of a rather indefinite character. See the cases of *Sheppard v. Wakeman*, 1 Lev. 53, and *Coxe v. Smithie*, 1

Actions for personal negligence amount to only two, and for deceit to only one. I see no way of accounting for this deficiency. It presents a curious contrast to modern cause lists, and one would have thought that men must have been careless and untruthful at this date as well as later. Actions for work and labor are also very scarce. Three hundred and fifty-nine cases, or more than a fourth of the whole number, relate to questions arising out of the ownership of land; though it is noticeable that only eight of these have reference to nuisances or incorporeal hereditaments. The great majority were questions as to the effect of various forms of limitation of estates.

Two matters are worthy of notice to those who are interested in the development of legal ideas, *viz.*, (1) the manner in which lawyers were feeling their way to a clear idea of what amounted to a wrong for which an action on the case would lie, and (2) the gradual working out of the doctrine of *assumpsit*, including the idea of consideration as a necessary element in contractual relations:

1. Maliciously setting the law in motion.

(a) Criminally.

Low v. Beardmore, Sir T. R. 135. Action on the case against the defendant for falsely and maliciously indicting the plaintiff for a *rescous*; and on not guilty found for the plaintiff, Powis, for the defendant, moved in arrest of judgment, that such an action on the case doth not lie for indicting one for a bare trespass, and this indictment was but a trespass. The Court seem to have come to no conclusion, but the point was evidently not considered settled, a case being quoted in the Exchequer Chamber against the plaintiff.

Henley v. Bursdal, Sir T. R. 180. Action upon the case for maliciously indicting the plaintiff, being a justice of the peace, for delivering a vagrant out of custody, without examination, contrary to law. Upon not guilty pleaded, a verdict found for the plaintiff; and Swain moved for the defendant in arrest of judgment, that such action doth not lie, because

Lev. 119, set out post at pp. 363-4, and, indeed, the two cases of *Eyres v. Sedgewicke* and *Lake v. King*, *supra*, in which the damage resulting from the libel is stated as the gravamen of the case rather than the libel itself. Nevertheless even these cases are so rare that I cannot help thinking that, as a rule, libel was dealt with as a criminal and not as a civil matter. It is noticeable, in this connection, that in the well known report of Coke, *The Cas de Libellis Famosis*, 5 Co. R. 125 a (3 Jac. I), there is no suggestion that a libel could give rise to anything but a penal proceeding.

it deters a man from prosecuting for the King. Maynard Serjeant for the plaintiff. Where the indictment is preferred maliciously, and such indictment contains matter of imputation and slander as well as crime; there the action lies; but otherwise where the indictment contains crime without slander, as forcible entry, *etc.*, but here is slander as well as crime; and of that opinion was all the Court; and judgment was given for the plaintiff.

(b) In the Ecclesiastical Court.

Gray v. Day, Sir T. R. 418. An action upon the case. The plaintiff declares, that he being church-warden of such a parish, and having given an account at the end of his year to his successor, and the parishioners; the defendant falsely and maliciously cited him into the Ecclesiastical Court to render an account, and there at the defendant's request the Judge excommunicated the plaintiff for not rendering the account. Upon not guilty pleaded, and verdict for the plaintiff, Saunders moved in arrest of judgment, because the sentence was given by the Judge, and so he and the Court were to blame, and not the defendant. But resolved the action lies; and judgment was given for the plaintiff.

Hoskins v. Matthews, 1 Lev. 292. Case, for that the defendant falsely and maliciously, without any reasonable cause, cited and excommunicated him in the Ecclesiastical Court. After verdict, it was moved in arrest of judgment, that it does not appear for what cause the suit there was. But *per Cur'*, it is said and found to be falsly, and without any cause; and the action lies, and judgment was for the plaintiff.

(c) Malicious Civil Proceedings.

Stribler v. Jones, 1 Lev. 275. Case, and declares, that the defendant falsly and maliciously devising to dampnify him, and to hinder him from going about his affairs, sued a *latitat* against him out of the King's Bench in trespass, with *ac etiam assumpsit* for 500 l. and caused him to be arrested and imprisoned for such a time, whereas in truth he had not any cause of action, *vel saltem non tantum causam actionis*. After verdict for the plaintiff, it was moved in arrest of judgment, that it is not positively said, *that he had not cause of action*; but *none, or at least not so great*; and it is not so great if it fails but of 1s. of so much. But the Court to the contrary, it is found to be done maliciously, wherefore judgment was ruled for the plaintiff.

Webster v. Haigh, 3 Lev. 210. Case for that the defendant wickedly intending and maliciously contriving *ipsum minus rite praegravare, & tam per corporis imprisonment' quam alias labores & expensas, praetextu justitiae &*

legis processus defatigare opprimere & depauperare & multipliciter praegravare & damnificare ex malitia sua praehabit' tali die & loco, virtute cujusdam brevis de quo minus e Cur', Scaccar' sine aliqua rationabili causa arrestari & imprisonari subdole fraudulentem & injuste causavit, & in prisiona detineri procuravit, until he gave a warrant of attorney to confess a judgment for 20l. in the King's Bench, Common Pleas, or Exchequer, whereby he had and suffered damages to 40l. To this the defendant demurred generally; and now it was argued for the defendant, that no action lies for suing in a proper Court; for a man may mistake his own case, and think he has a good cause of action where it proves otherwise; *and here the declaration does not say, that he knowing he had no cause of action sued* But for the plaintiff it was argued, that the action lies as it is laid here; for it is said, the action was brought *ex malitia praehabitata, & sine aliqua causa rationabili ipsum damnificare*, which implies the *knowing* he had no cause of action; and this is confessed by the demurrer And here Charlton held *totis viribus*, that the action did not lie because the law had provided another remedy, *viz.*, costs. But Jones Chief-Justice and Just. Street held, that the action lay for the unjust, causeless, and malicious vexation premeditated, all which are confessed by the demurrer. Levinz doubted, because it is not expressly said, *knowing he had no cause of action*; but he inclined, that the action lay, because the defendant had compelled the now plaintiff to give him a judgment for 20 l. whereby he is deprived of his remedy by costs, *etc.* But it was adjourned.

It will be noticed that in these cases the law is in a state of fluidity. It is apparently not settled either what constitutes the cause of action, or for what reason. But very shortly afterwards, in the case of *Savile v. Roberts*, in the Exchequer Chamber, 1 Lord Raymond 374 (9 Wm. III), the judgment of Holt, C. J., lays down the law very nearly in accordance with modern ideas. In that case the declaration was drawn (omitting verbiage) substantially in the modern form, and alleges all that it would be necessary to allege in a similar case at the present day, *viz.*, that Savile

"machinans et nequiter et malitiose intendens ipsum Jacobum (Roberts) minus rite praegravare etc. . . . sine causa rationabili, ex malitia sua praecogitata apud Barnesley in comitatu praedicto apud generalem quarterialem sessionem pacis coram etc. . . . de eo quod ipsi secundo die Octobris anno regni domini Willelmi tertii Dei gratia nunc regis Angliae, &c. septimo, vi et armis apud Beneby prae-

dictam in le West Riding comitatus praedicti riotose routose illicite et injuste sese assemblerunt et congregaverunt etc. . . falso indictari malitiose fecit et procuravit, ac indictmentum illud versus ipsum Jacobum Roberts falso et malitiose prosecutus fuit et prosecutum esse causavit, quousque idem Jacobus Roberts postea etc. . . debito modo secundum legem et consuetudinem hujus regni Angliae inde acquietatus fuit. . . Quorum quidem praemissorum praetextu idem Jacobus Roberts non solum in bonis nomine fama credentia et aestimatione suis praedictis quibus praeantea gavisus fuerit magnopere laesus ac in diversis negotiis licitis et honestis agendis multipliciter impeditus existit, verum etiam idem Jacobus valde graves et arduos labores subire et diversus denariorum summas pro acquietatione sua praedicta et ejus exoneratione in hac parte expendere et erogare coactus et compulsus fuit, ad damnum ipsius Jacobi Roberts viginti librarum etc."

I have set the material passages of this declaration out at length because it shews such a surprisingly sudden advance from the inchoate, tentative, and jerky declarations in the cases previously cited, and, in fact, is just in the form in which a similar cause of action would be alleged in England in the present day. All the necessary ingredients are stated, *viz.*, that Savile falsely and maliciously and without reasonable and probable cause presented and prosecuted an indictment against Roberts, that Roberts was acquitted and suffered damage, in reputation and in pocket. As the earliest of the cases previously cited was in 17 Car. II (1667) and the latest in 1 Jac. II (1685) and the case of *Savile v. Roberts* was in 9 Wm. III (1702), the advance in legal conception by the pleader is remarkable, especially as the law was still quite uncertain. In the case of *Savile v. Roberts* there was a verdict for the plaintiff; defendant then moved in arrest of judgment and the case was argued two or three times at the bar of the Court of Common Pleas, and then there was a division of opinion in the Court, Nevill and Powell, JJ., holding that the action would well lie, but Treby, C. J., being of the contrary opinion. Whereupon the case was taken on error to the Exchequer Chamber, where the Court, under the guidance of Holt, C. J., were unanimous in favor of the plaintiff, Holt, C. J., saying:

"that this point is no *primae impressionis*, but that it has been much unsettled in Westminster-Hall, and therefore to set it at rest is at this time very necessary."

He then proceeds to expound the law, to a great extent as it would be laid down at the present time, and draws the distinction between a malicious criminal prosecution and malicious civil proceedings very much as was subsequently decided by the Court of Appeal in *The Quartz Hill Consolidated Gold Mining Co. v. Eyre*, (1883) II Q. B. D. 674, in which the judgment of Holt, C. J., is quoted as the standard pronouncement on the subject.

2. Malicious Injury to Reputation.

Mason v. Jennings, Sir T. R. 401. In a special action upon the case. The plaintiff declares, that he is a hackney-coachman, and that the defendant with an intent to disgrace him did *ride Skimmington*.⁵

In *Cropp v. Tilney*, 3 Salk. 225, Holt, C. J., who is not often caught tripping, says:

"as for instance, an action was brought by the husband for riding Skimmington, and adjudged that it lay, because it made him ridiculous, and exposed him,"

and he gives it as an example that in an action for *libel* it is sufficient that the alleged libel should make a man ridiculous. And this is quoted in all the text-books to the present day, ignoring the fact that in at least two cases "riding Skimmington" had been held not to be actionable. How such a proceeding could be a *libel* it is difficult to see, and as no special damage was alleged it would not be actionable as a slander.

3. Miscellaneous Actions for Damage Arising from False Statements.

Sheppard v. Wakeman, 1 Lev. 53 (14 Car. II). Case, where the plaintiff was to be married to such a one who intended to take her to his wife; the defendant falsely and maliciously to hinder the marriage, writ a letter to the said person, that the plaintiff was contracted to him, whereby she lost her marriage. After verdict for the plaintiff, it was moved, that the action did not lie, the defendant claiming title to her himself, like as *Gerrard's case*, 4 Co. for slander of title. But after divers motions, the plaintiff had judgment, for it was found to be malicious and false; and if such an action should not lie, a mean and base person might injure any person of honour and fortune by such a pretence.

⁵For "riding Skimmington" see Butler's "Hudibras," Part II, Canto II, lines 560-712.

Coxe v. Smith, 1 Lev. 119 (15 Car. II). Case for that he being an officer of the Custom-House, the defendant made a false affidavit against him in Chancery, touching malfeasance in his office; and afterwards petitioned the commissioners of the Customs against him, and thereupon caused him to be turned out of his place: after a verdict (upon not guilty) for the plaintiff, it was moved in arrest of judgment, that no action lies for the making of a false oath, Owen 258. 2 Cro. 601. Hutt. 11. Poph. 144. 1 Leon. 107, and that no action lies for the petition, because it is done in a course of justice. But (said) by the Court. The action is not founded on the oath, nor on the petition, but those are only inducements to prove the malicious procurement to have him turned out of his place: and that it was falsely and maliciously done, is now found by the verdict; and they gave judgment for the plaintiff.

Ekins v. Tresham, 1 Lev. 102 (15 Car. II). Case, that whereas the plaintiff and defendant were in treaty for the sale of a messuage; the defendant falsely and fraudulently affirmed it was let at 42 l. per annum; whereto the plaintiff gave faith, gave him 500 l. for it, where in truth it was let at 32 l. per annum only. After verdict for the plaintiff, it was moved in arrest of judgment, that the action did not lie; as for saying that a thing is of a greater value than it is, without warranty no action lies, Yelv. 20. No more will it for saying that it is demised for more than in truth it is; for the party might inform himself from the tenant, and a warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is apparently blind of one of them. But by the Court, tho' an action will not lie for saying, that a thing is of greater value than it is (nor by Wyndham, it is perjury to swear it, because value consists in judgment and estimation, wherein men many times differ). Yet to affirm that a thing is demised for more than it is, is a falsity in his own knowledge, and the party who is deceived, may for such deceit have an action, for perhaps the lease is by parol, or the tenant will not inform the purchaser what rent he gave. And after it had been twice moved, judgment was given for the plaintiff in Trinity, 15 Car. II, by the whole Court.

Cooper v. Witham, 1 Lev. 247 (20 Car. II). Case against the husband and wife, for that she being covert, affirmed herself to be sole, and requested the plaintiff to marry her, and lays it to be done maliciously, with intent to deceive him; whereupon he married her, whereby he was disturbed in conscience, and put to great charge by the husband. After a verdict for the plaintiff on (the issue) not guilty, it was moved in arrest of judgment, that the action does not lie; for the wife cannot by any contract or agreement charge the husband, and if he should be charged

here, it would be by the wife's contract with the plaintiff to marry him; but for trespass or words she might charge the husband, for that she may do without assent of the husband or any other; and if damage ensue thereupon, it ought to be recompensed by some body, and no other can do that but the husband. But this marriage could not be made without the assent and contract of the plaintiff (himself) and therefore it shall not charge the husband, and so held the Court, and gave judgment for the defendant: they also said, that this was felony in the wife, and Twysden said, that an action did not lie for the master for beating of his servant to death, for that he lost his service; for the party ought to be indicted for it, as is Yelv. 90. But see Latch 144, *Markham* against *Cobb*, Style 346, 347. *Dawes* against *Covenigh*, that trespass lies for a felonious taking money after the party has been convicted and burnt in the hand: also it was here said, that the wife had been pardoned of the felony, but that did not appear upon the record; and if she had, yet the fact sounding in contract, it seems that the action does not lie.

The first two of these cases present a curiously hybrid appearance. At the present day they would take the form of actions for libel, *simpliciter*, if they disclosed any cause of action at all. As in fact framed, they are a kind of hybrid between an action for libel and an action for a wrongful procuring of an act to be done by another by means of a false statement. The two latter cases are cases of deceit, practically in the modern form, and shewing that the Courts already appreciated the distinction between an actual false representation and a mere puffing of wares or property.

4. Actions upon the Case against a Public Official for Breach of a Public Duty.

Starling v. Turner, 2 Lev. 50 (24 Car. II). Case, and declares that by the custom of London, the bridge-master is chose by plurality of voices of the freemen, and that if the electors are so divided, that the majority cannot be known by the view, that the mayor ought to grant a poll; and that Starling being mayor, where upon the election the majority could not be known, refused to grant a poll to Turner, a candidate at that election, by which he lost the office. After verdict and judgment for Turner, plaintiff in the Common Pleas, error was brought in B. R. and assigned for error, that the action lies not, because it is not shown that he had been elected if a poll had been granted. *Sed non allocatur*. For the mayor did not do his duty, and 'tis said by that he lost the office, which after verdict is sufficient;

and of that opinion were all the judges of the Common Pleas, but Vaughan Chief Justice. *Note*, It was not a question in either of the two Courts, whether an action of the case would lie, for the bare denying or refusing of a poll, and returning another? But this seemd to be admitted by both Courts.

Herring v. Finch, 2 Lev. 250 (31 Car. II). Case; whereas the plaintiff was a freeman, and had a voice in the election of *mayors*, the defendant the present mayor refused to receive his vote; and now upon issue and trial the plaintiff was nonsuit, but the *roll* not *marked* for double costs. And now the defendant moved to have double costs, which was opposed, because it does not appear whether the plaintiff was nonsuit for want of proof that the defendant was the present mayor. 2. The statute gives double costs where the officer is sued for matter done by him in doing his office, and this suit is for *non fezans* in his office. *Cur'*. This case is not within the intent of the statute; the scope whereof was, that whereas mayors, &c., were sued for false imprisonment, or such matters, wherein they ought to justify that they may plead the *general issue*, and shall have *double costs*, but not in such cases as this.

The actual point reported in this case is not of importance except that it is interesting to see how far back the protection to public officials extends. But in his famous judgment in *Ashby v. White*, *Ld. Raym.* 938 (2 Anne), Lord Holt, C. J., says of this case:

"So in the case of *Herring v. Finch* nobody scrupled but that the action well lay, for the plaintiff was thereby deprived of his right."

Bernardiston v. Some, 2 Lev. 114 (26 Car. II). Case, and declares that a writ issued out of Chancery to the defendant, then Sheriff of Suffolk, to elect a knight of the county for the Parliament, and that the plaintiff was chosen by the majority of freeholders, and that the defendant returned the writ with an indenture of the said election, but maliciously intending to deprive the plaintiff, *de fiducia & praed' falso & deceptivo, una cum indentura praed' retornavit unam alteram indenturam in Cancellaria praed' specificant' quod aliae personae liberi tenentes vel major pars liberorum tenentium elegerunt quendam Lionellum Tolmach, ubi revera praed' Lionellus non fuit electus per majorem numerum liberorum tenentium, ratione cujus* the plaintiff was kept out of the House of Commons, and put to great charge to prove his election in the House of Commons. The defendant pleaded *non culp.* and upon trial at Bar, Twysden Rainsford and Wylde held, and so directed the jury, that if this double return was made maliciously, they ought to find for the

plaintiff, which accordingly they did, and gave him 800 l. damages, though the evidence as to the malice and falsity was very slender. . . . And now it was moved in arrest of judgment by North Attorney General, and Scroggs King's Serjeant, that this action lies not, . . . *First*, Because the falsity or verity of the return is only examinable in the House of Commons, who are the sole judges, and will punish such falsities, and accordingly they have so done in this case, by committing the Sheriff. . . . *Secondly*, The right of the party is not considerable in this case for this is not an office of profit, but of trust concerning the State. *Thirdly*, What the Sheriff does in this case, he doth as a judge; for he is a judge of the election, and therefore no action lies against him. *Fourthly*, . . . the sheriff hath done no more in this case than laid the matter before the House of Commons, that the validity of the votes may be there deliberately examined. To which it was answered by Maynard, King's Serjeant, and Sir William Jones, Solicitor. *First*, That here was malice and falsity in the Sheriff, and thereby damage and charge to the plaintiff, and all this was found by the jury, which is sufficient to maintain an action in all cases, whether there has been a like action in such case or no before; for actions upon the case are founded upon the particular case, which is mostly new. . . . *Secondly*, The commitment by the Parliament is only to punish the contempt of the sheriff as to them and the State, but not to repair the party for the damage he sustained. . . . *Thirdly*, The sheriff is not a judge of the election in this case, but a minister to take the polls, of which in point of sufficiency the House of Commons is judge. . . . *Et adjournatur ad proximum terminum*, when Hale being in Court, he, Twysden and Wylde, for as much as the return is said to be *falso & malitiose & ea intentione* to put the plaintiff to charge and expence, and so found by the jury, held the action lay, and gave judgment for the plaintiff, Rainsford doubting; upon this a writ of error was brought in the Exchequer-Chamber, where, by North Chief Justice, and five other Judges against two, the judgment was reversed upon the matter in law, that the action lies not.⁶

This batch of cases is interesting as shewing that, even at this period, the courts had practically arrived at the conclusion, afterwards categorically affirmed in the well known case of *Ashby v. White, supra*, that an action on the case lay for the bare infringe-

⁶ It would have been interesting to see the judgment in this case in the Exchequer Chamber, but in the only report that I can find of it, Pollexfen 470, only the judgment of one of the Judges in the minority is given.

ment of a positive legal right, even where no damage in fact could be established—*ubi jus ubi remedium*. It is perhaps, however, worth observing that the pleaders had apparently not yet made up their minds exactly as to what the cause of action was, as, even in the case of *Ashby v. White*, it was alleged that the defendants,

“contriving, and fraudulently and maliciously intending to damnify him, the said Matthias Ashby, in this behalf,”

did then and there hinder him, the said Matthias Ashby, *etc.* They seem to have thought that it was necessary to allege and prove that the act of the defendant had been done maliciously and dishonestly, as in the case of malicious prosecution—whereas, in fact, such allegation was wholly immaterial, except possibly in the case of the double return.⁷

5. Actions upon the Case against Private Persons for Breach of a Duty arising from a Contractual Relation.

Mors v. Slue, Sir T. R. 220, 1 Vent. 190, 238 (24 & 25 Car. II). (The pleading is taken from the report in Ventris.) An action upon the case was brought by the plaintiff against the defendant; and he declared, that whereas according to the law and custom of England, masters and governors of ships which go from London beyond sea and take upon them to carry goods beyond sea, are bound to keep safely day and night the same goods, without loss or subtraction, ita quod pro defectu of them, they may not come to any damage; and whereas the 15th of May last, the defendant was master of a certain ship called “The William and John,” then riding at the port of London, and the plaintiff had caused to be laden on board her three trunks, and therein 400 pairs of silk stockings, and 174 pounds of silk, by him to be transported for a reasonable reward of freight to be paid, and he then and there did receive them, and ought to have transported them, &c., but he did so negligently keep them, that in default of sufficient care and custody of him and his servants, the same were totally lost out of the said ship.

⁷ I suspect that there may have been another reason for this. It was a rule of the old procedure that “in no case where a contempt, deceit, trespass, or injury is supposed in the defendant, shall he wage his law.” Bac. Abr.: Wager of Law, p. 350, quoting 1 Inst. 295 a. Now one of the great objects of pleaders in old days was to avoid framing a case in such a way that the defendant could wage his law. It may be that when they invented the new formula of trespass on the case, they garnished their pleading with these irrelevant expletives in order to make sure that under the new form of action the defendant should not be allowed to wage his law.

Upon not guilty pleaded, the jury found a special verdict, viz. that the defendant was master of a ship which lay in the river of Thames, near St. Katherine's, that the plaintiff delivered goods to him to transport. That the defendant received his salary from the owner of the ship; that there being three men and a boy in the said ship, persons unknown, about eleven o'clock in the night came on board with a pretended warrant to search for felons, and seized upon the persons in the ship, and took away the goods; and whether the defendant was guilty was the question, viz. whether the master or owner of the ship should answer these goods; and resolved for the plaintiff.

Virtue v. Birde, 2 Lev. 196 (29 Car. II). Case that whereas the defendant had hired him to carry a load of timber from Woodbridge to Ipswich to be laid there at any place the defendant should appoint, and that he gave notice to the defendant that he would carry it such a day, and requested the defendant at Woodbridge to appoint where it should be laid, and that accordingly he carried it to Ipswich, and the defendant appointed no place where it should be laid, but made the horses of the plaintiff being hot stay so long in the cart, that they took cold, whereby some of them died, and the rest were spoiled; and after verdict for the plaintiff, upon *non culp.* judgment was staid, because the action lies not; for, first, he might have taken his horses out of his cart, and have walked them up and down, or put them into the stable. 2. As soon as he came there, and found no place appointed by the defendant, he might have unladen the timber in any convenient place, and returned; and therefore the injury which the horses received is owing to himself, and through his own default.

Boson v. Sandford and Others, 3 Lev. 258 (1 William and Mary). Case against the defendants proprietors of a ship, wherein goods are usually transported for hire; and that the plaintiff loaded goods on board the said ship to be carried for hire from London to Topsham in Devonshire; and that the defendants received them and undertook to carry them to Topsham, but that they not being careful therein, but neglecting their duty, did so carelessly place and carry the goods, that though the ship arrived safely at Topsham, yet the goods were spoiled: and on *not guilty* the jury found a special verdict, viz. that ten other persons besides the defendants are proprietors and part-owners of the ship; that the ship had a master placed in her by the part-owners, who had 60 l. wages for every voyage between Topsham and London; that the goods were delivered to the master, none of the part-owners being present, and that no contract was made with them or any for the plaintiff, that the ship should arrive safe at Topsham, but that the goods were

spoiled by negligence, &c. And if for the plaintiff, for the plaintiff; and if not, for the defendant. And two questions were made in this case. 1. Whether the proprietors are chargeable, no contract being made with them, for that here was a master who was chargeable in respect of his wages, as in the case of *Mors and Slue*, lately adjudged in this Court. And as to this point Holt (now Ch. Just.) held clearly, that though the master be chargeable in respect of his wages, so are the proprietors also (in respect of the freight, which they received for the carriage of the goods) at the plaintiff's election. 2. Whether the action lay against the defendants only, it appearing there are other part-owners, who are not made defendants: *and he held, that the action did not lie, except it were brought against all the part-owners; for they are all chargeable in respect of their (joint) profit made by the carriage, and that in point of contract upon their (joint) undertaking, be it either expressed or implied: and they are not chargeable as trespassors, for then one of them might be charged alone, but in point of contract upon their receipt of the goods to be carried for hire, and so has the plaintiff laid it in his declaration, viz. that they undertook to carry them, &c.* (See the considered judgment in this case in Shower. 29.)

Horton v. Coggs, 3 Lev. 295 (2 William and Mary). *London, to wit.*—John Coggs, late of London, goldsmith, was attached to answer Edward Horton of a *plea of trespass upon the case, &c.* The plaintiff declares of a custom in London, that if any merchant, or other person merchandizing in London, makes a note in writing under his hand, and thereby promises to pay any sum of money therein mentioned to the person therein named, or to the bearer; and if the person named in the note, to whom by the note it is promised to be paid, shall assign or deliver it to another person to receive it to his own use, and he carries it to the drawer of the note, and requests him to pay it to him that brings it, that then the person who makes the note is chargeable to pay it to the bearer; and that the defendant being a *goldsmith* made such a note, thereby promising to pay 55 l. to William Barlow, or the bearer: and that Barlow delivered the note to the plaintiff to receive the money to his own use, in satisfaction of the said 55 l. due to him by Barlow, and that the plaintiff carried and shewed it to the defendant, whereby the defendant, according to the custom aforesaid, became liable and was liable to the payment of the said 55 l. upon the said note to the plaintiff; and so being liable the defendant afterwards, in consideration of the premises, upon himself *assumed* and to the plaintiff then and there *faithfully promised* that he the defendant the said 55 l. to the plaintiff would well and faithfully pay and content. . . . Never-

theless the defendant, his promises and assumptions afore-said not regarding, but contriving and fraudulently intending the plaintiff in this behalf craftily and subtilly to deceive and defraud, the said 55 l. . . . hath not paid &c. And the *defendant comes and defends the force and injury when &c. and saith that he did not assume upon himself in the manner and form as the plaintiff above complains of him &c.* After a verdict for the plaintiff it was moved in arrest of judgment, that this custom to pay to the bearer was too general; for perhaps the *goldsmith* before notice by the bearer had paid it to Barlow himself. And of that opinion after divers motions were Pollexfen, Powell and Rokesby, (Ventris dying in the last vacation;) though upon the trial of the cause before Pollexfen at the Guild-Hall he then held, that the action well lay, this matter having been objected at the said trial. Levinz of counsel for the plaintiff.⁸

Panton v. Isham, 3 Lev. 359 (5 William and Mary). Case, and declares on the custom of the realm, that every one ought to keep their fire so, that by default thereof no damage should happen to another, and that the defendant so negligently kept his fire, that *six stables, six hay-lofts, and three lodging rooms* of the plaintiff were thereby burnt. The defendant pleads *not guilty*, and on a special verdict it was found, that the plaintiff was seised of the stables, etc., and demised one of the stables to the defendant for a week for 8 s. and so from week to week at 8 s. per week, as long as both parties should please, and demised the other five stables to divers other persons for divers terms yet to come, whereby they were possessed; and being so possessed, the fire, *by the defendant's negligence*, six weeks afterward begun in the stable demised to the defendant, and burnt the same and all the other stables, &c. And if for the plaintiff, for the plaintiff, &c. Damages 100 l. and tax the damages severally, viz. 15 l. for the stable demised to the defendant, and 85 l. for the others, and costs 20 s. And upon several arguments last term and this term, judgment was given for the plaintiff for the 85 l. and for the defendant for the 15 l. . . . 2dly, That for the stable demised to the defendant himself, no action lay; for the demise to him could be no more than a term for three weeks, and for the residue he was tenant at will, against whom no action lay for negligent waste, as 5 Co. 14, *The Countess of Shrewsbury's case*. But 3dly, As to the stables demised to the other, the action well lies, as if they were the stables of strangers, and not of the lessor; for

⁸ In consequence of this decision and subsequent decisions of Lord Holt refusing to recognize promissory notes as negotiable (see *Clerk v. Martin*, 2 Ld. Raym. 757) a statute was passed (3 & 4 Anne, c. 9) which placed promissory notes on the same footing in this respect as bills of exchange.

as to them there is no privity between the plaintiff and the defendant. . . . 4thly, Although the other stables, &c. were in lease to others, who may have an action as to the possession for their losses, yet the lessor may also have an action for damages to his inheritance, as was formerly adjudged in this Court in the case of *Beddingfield* against *Onslow*, 3 Lev. 209.

Coggs v. Bernard, 2 Ld. Raym. 909 (2 Anne).⁹ In an action upon the case the plaintiff declared *quod cum Bernard* the defendant, the 10th of November 13 Will. 3, &c., *assumpsisset, salvo et secure elevare, Anglice*, to take up certain hogsheads of brandy then in a certain cellar in D. *et salvo et secure deponere, Anglice* to lay them down again in a certain other cellar in Water-Lane, the said defendant and his servants and agents, *tam negligenter et improvide* put them down again into the said other cellar, *quod per defectum Curae ipsius* the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alledged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. . . . *Gould*, Justice. . . . The reason of the action is, *the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect.* . . . *Powell*, J. . . . Now to give the reason of these cases, the *gist* of these actions is the undertaking. The party's special *assumpsit* and undertaking oblige him so to do the thing, that the bailor come to no damage by his neglect. *Holt*, Chief Justice. . . . There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. . . . (He then delivers his famous disquisition on bailments.) The reasons are, first, because in such a case, a neglect is a deceit to the bailor. For when he instructs the bailee upon his undertaking to be careful, he

⁹ This case is inserted, although it is in date just outside the period that we are dealing with, because it so exactly raises the difficulty of the distinction between contract and tort dealt with below.

has put a fraud upon the plaintiff by being negligent, his pretence of care being the persuasion that induced the plaintiff to trust him. And a breach of a trust undertaken voluntarily will be a good ground for an action. 1 Roll. Abr. 10 There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drown'd by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; in as much as he has taken and executed his bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz. his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore the undertaking is but *nudum pactum*. But to this I answer, *that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management*. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing. . . .

This series of cases is very instructive, possibly rather humiliating to English lawyers. The inheritors of the English Common Law are apt to boast that it is really much more scientific than the Roman Law—that the latter does not even recognize the distinction between contract and tort. These cases show how nebulous the English distinction really is, and how illogical. A tort has been well defined as, theoretically, “a breach of duty (other than a contractual or quasi-contractual duty) creating an obligation, and giving rise to an action for damages.”¹⁰ According to this definition, there is only one of these cases which is really an action for tort, viz., *Panton v. Isham*. The others are all actions for breach of

¹⁰ A Digest of English Civil Law, edited by Edward Jenks, Book ii, Part iii, by J. C. Miles, p. 326.

“Quasi-contractual” is here used, substantially, for the class of cases where an action on the money counts would have been available under the old system of pleading. It will be seen *infra* that, though this definition is theoretically correct, it does not accurately state the English law.

contract, because bailment is clearly a contract. Nevertheless, all these cases, with the exception of *Horton v. Coggs*, would be regarded in English law as actions of tort because the right plea for the defendant was "not guilty" instead of "*non assumpsit*."

This is a good illustration of Maine's sage and oft-quoted maxim that "substantive law has at first the look of being gradually secreted in the interstices of procedure."¹¹ The action of *assumpsit* should, naturally, have been developed either from the old action of *covenant* or the old action of *debt*. It is quite easy to understand why it was not affiliated to *debt*, because in most actions of *debt* the defendant could wage his law. In *covenant* the defendant could not wage his law, but there were probably technical rules about the production of the document sued upon which rendered it inapplicable to an oral agreement. However this may be, in fact the action of *assumpsit* was developed from the action of *trespass*, through the medium of the action of *trespass on the case*. There is a good example of this in the pleadings in the case of *Horton v. Coggs*, *supra*. The defendant is "attached to answer Edward Horton of a plea of *trespass on the case*." Then the declaration goes on to allege a cause of action in *assumpsit*, and the plea is *non assumpsit*. *Per contra*, in *Coggs v. Bernard*, *supra*, the declaration is apparently in *assumpsit*, and it is so treated by all the Judges in the case, yet the plea is *not guilty*; and for that reason, in the comparatively modern case of *Corbett v. Packington*¹² it was held to have been an action in *tort* and not in *assumpsit*, the action of *assumpsit* having by this time come to be regarded as an action of contract, as opposed to an ordinary action of *trespass on the case* which was regarded as an action in *tort*.

There is no doubt that, because of their lineage, originally all actions which were nominally actions of *trespass on the case* were regarded as actions of *tort*, whether they arose from a breach of duty which was independent of contract, or whether the act complained of was a wrong only because it was a breach of contract. The next step was to draw a distinction between the cases of persons who followed a public calling such as common carriers or innkeepers, and the rest of the world, and to say that, if a man were sued, upon

¹¹ Maine, *Early Law and Custom*, p. 389.

¹² (1827) 6 B. & C. 268, at p. 272.

the custom of the realm, for the breach of a duty which he owed to all persons alike who dealt with him, and who were entitled to command his services, that was an action in tort; but that if he were merely a private person who was guilty of the breach of a particular engagement, then the action against him was in contract. This distinction is continually referred to in the cases above set out. It seems to me to have been practically disposed of by the cases of *Boson v. Sandford* and *Coggs v. Bernard*, *supra*. In the first of these cases the action was against the defendants as common carriers and the plea was *not guilty*. Nevertheless, it was held that it was an action for breach of contract, and that *therefore* some of the co-owners could not be sued without joining the others. In *Coggs v. Bernard* it was not alleged that the defendant was a common carrier, and that point was taken as one of the grounds for arresting judgment, but, nevertheless, it was held that the defendant was liable.

The ultimate rule adopted by the English Courts is thus stated by a very eminent Judge:

“The distinction between tort and contract is not a logical one, and it is sometimes difficult to say whether a particular thing is a wrong or a breach of contract. If the claim of the plaintiff is set out at large, pointing to some particular stipulation in the contract which has been broken, the action would be founded on contract; but where it is only necessary to refer to the contract to establish a relationship between the parties, and the claim goes on to aver a breach of duty arising out of that relationship, the action is one of tort.”¹³

One may heartily agree with the learned Judge that the distinction is illogical. The breach of duty arises equally out of contract whether it is a breach of a duty imposed by the Common Law upon the parties to all contracts of a certain class, or whether it is a breach of a particular duty imposed upon the particular parties by the particular contract. The only logical distinction would seem to be between a breach of a duty which arises independently of contract altogether, and a breach of a duty which arises only because of a particular antecedent contract. The existing confusion

¹³ *Per* Collins, L. J., in *Sacks v. Henderson*, 1902, 1 K. B. D., p. 616. See also *per* the same Judge in *Turner v. Stallibrass*, 1898, 1 Q. B. 56.

is really the result entirely of the curious development of legal procedure in this country; and, to my mind, can only be understood by reference to such a group of cases as those collected above. The net result is that in England the same transaction may give rise both to a right of action in tort and to one in contract.¹⁴

6. Actions of *Assumpsit* shewing the Development of the Doctrine of Consideration.

Traverse v. Meres, Sir T. R. 32 (13 Car. II). The plaintiff declares, that whereas the husband of the defendant now dead, was indebted to the plaintiff, the defendant promised, that if the plaintiff would manifest and make appear that her said husband was indebted, she would pay it; and avers, that he had been at all times ready to manifest the said debt; and on *non assumpsit* found for the plaintiff. And Allen moved in arrest of judgment, that there is not any consideration, for that the wife was neither executrix nor administratrix. Trin. 51, Rot. 1446, *Hunce versus Hinton*. The son of the defendant was indebted to the plaintiff, and the defendant promised upon forbearance to pay; and there judgment was for the plaintiff, because forbearance shall be taken for total forbearance. . . . *Twisden*, Justice. The difference is betwixt forbearance generally, there is a good ground of action, although the defendant be neither executor nor administrator; but upon forbearance of the defendant it ought to appear that there was some cause of forbearance. Wild for the plaintiff. The making of the debt appear, is trouble and pains to the plaintiff, and therefore a good consideration. It was adjourned, and afterwards judgment was given for the plaintiff.

Benson v. French, 1 Lev. 98 (15 Car. II). *Assumpsit* and declares, that he had arrested a woman for 20 l. and that she being in the custody of the bailiff at the defendant's house, the defendant in consideration that the bailiff would permit the woman to tarry at the defendant's house for one night, promised to the bailiff on the plaintiff's part, to deliver the woman to the bailiff the next morning, or to pay the 20 l. And that the bailiff permitted the woman to tarry there that night; but that the defendant did not deliver her to the bailiff the next morning, nor had he paid the 20 l. After verdict on *non assumpsit* for the plaintiff, it was moved in arrest of judgment by Wylde the King's Serjeant, that the woman was either always in the custody of the bailiff, (and then it was not any consideration) or out of his custody, and then it was an escape, and the consideration and pro-

¹⁴ See *Meux v. The G. E. Ry. Co.*, (1895) 2 Q. B. 387.

mise were (then) both illegal. To which it was answered by Jones, that it might be for the ease of the woman to lie there that night, and so a good consideration, though never out of the custody of the bailiff; and if it be intended that she was out of the bailiff's custody, yet it shall be intended that it was by the plaintiff's assent, because the promise was made to the bailiff on the plaintiff's part; and the plaintiff having brought the action it proves his assent, and his assent after is sufficient to make the promise good. And held by the Court, if it was an escape, the consideration and promise were both illegal; but they held that it was not any escape, but rather an undertaking that she should not escape; and the promise being laid to be made to the bailiff on the plaintiff's part, it shall be intended that she was left there by the assent of the plaintiff. And they gave judgment for the plaintiff. . . .

Quick v. Coppleton, 1 Lev. 161 (17 Car. II). *Assumpsit*. Whereas the defendant's late husband was indebted to the plaintiff, and she about to come to London, and being in fear to be arrested by the plaintiff, she promised him in consideration that he would not trouble her, and would forbear till Michaelmas, to pay, &c. After verdict, it was moved, that she not being shewn to be executor or administrator, the forbearance was not any consideration, which was agreed by the Court; but the subsequent words *forbear till Michaelmas*, are distinct and general, not only to forbear her but all others, and makes a good consideration, whether she be liable or not; and they cited *Heriot and Hinton's case* adjudged, that a general forbearance is a good consideration, whether the party promising be liable or not. . . . And Hyde Chief Justice held, that a forbearance to sue one who fears to be sued, is a good consideration; and he cited a case in the Common Pleas, when he sate there where a woman who feared that the dead body of her son would be arrested for debt, promised in consideration of forbearance, to pay; and it was adjudged against her, though she was neither executor nor administrator. But of this the other Judges doubted.

Harvy v. Gibbons, 2 Lev. 161 (27 & 28 Car. II). Error of a judgment in Shrewsbury Court, where the plaintiff declared, that he being bailiff to J. S. the defendant in consideration that he would discharge him of 20 l. due to J. S. promised to expend 40 l. in repairing a barge of the plaintiff's; verdict and judgment for the plaintiff, upon *non assumpsit* was reversed, the consideration being illegal, for the plaintiff cannot discharge a debt due to his master.

Tripps v. Rand, 2 Lev. 198 (29 Car. II). *Assumpsit* in consideration the plaintiff at the defendant's request would procure himself to be made a knight at his own proper

charges, so that his wife, the defendant's daughter, might be a lady, to pay him 2000 l. and says, that he procured himself to be knighted at his own charges, whereby his wife became a lady; yet the defendant had not paid him. After verdict and judgment upon *non assumpsit in Com. Banc.* it was now assigned for error in B. R. that it is not said the plaintiff procured himself to be knighted at the request of the defendant: it might be he did it of his own head, and the request here is part of the consideration, executory and traversable, and by omitting it the plaintiff (defendant?) hath lost his traverse of the request; and upon *non assumpsit* he was not obliged here to prove a request upon evidence, as are the cases in Hob. 88, 106, and for authority in point, 2 Leon. 53. 3 Leon. 91. *Curia contra*, The request shall be intended here to be made at the time of the promise; *scil.* that he then requested him to be made a knight, and promised to give him 2000 l. and it shall not be intended that he promised to give him the 2000 l. if he would procure himself to be made a knight when he should afterwards request him, and so the request is not executory, but executed at the time of the promise made: and they gave rule to affirm the judgment; but at the earnest motion of Jones Attorney-General, to be farther heard for the plaintiff in error, it was adjourned until next term, when the judgment was affirmed by the whole Court.

Dutton and Wife v. Poole, 2 Lev. 210 (29 Car. II). *Assumpsit*, and declares, that the father of the plaintiff's wife being seised of a wood which he intended to sell to raise portions for younger children, the defendant being his heir, in consideration the father would forbear to sell it at his request, promised the father to pay his daughter, now the plaintiff's wife, 1000 l. and avers, that the father at his request forbore, but the defendant had not paid the 1000 l. After verdict for the plaintiff upon *non assumpsit*, it was moved in arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her: also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise, and divers cases were cited for the defendant, as Yelv. *Rippon v. Norton*, *Hawes v. Leader*, *Starky v. Milner*, 1 Roll. 31, 32, Sty. 296, and a case lately resolved in *Com. Banc. inter Norris & Pine, intrat.* Hill, 22 & 23 Car. II, 1538, where the case was; *If you will marry me, I will pay your children so much; and*

the action being brought by the children, adjudged it lay not. On the other side it was said, if a man delivers goods or money to H. to deliver on pay to B., B. may have an action, because he is to have the benefit of the bailment; so here the daughter is to have the benefit of the promise: so if a man should say, Give me a horse, I will give your son 10 l. the son may bring action, because the gift was upon consideration of a profit to the son; and the father is obliged by natural affection to provide for his children; for which cause affection to children is sufficient to raise a use to them out of the father's estate; and therefore the daughter had an interest in the consideration; and in the promise; and the son had a benefit by this agreement, for by this means he hath the wood, and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father, and for authorities of this side were cited, Roll. 1 Ab. 31, *Oldman v. Bateman*, and *ibid.* 32, *Starky v. Meade*. Upon the first argument Wylde and Jones Justices seemed to think, that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise, nor consideration. Twysden and Rainsford seemed *contra*; and afterwards two new Judges being made, *scil.* Scroggs Chief Justice in lieu of Rainsford, and Dolbin in lieu of Twysden, the case was argued again upon the reasons aforesaid; and now Scroggs Ch. Just. said, that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children: and he and Jones remembered the case of *Norris & Pine*; and that it was adjudged as aforesaid. But Scroggs said, he was then and still is of opinion contrary to that judgment. Dolben, Justice, concurred with him that the daughter might bring the action; Jones and Wylde *haesitabant*. But next day they also agreed to the opinion of the Chief Justice and Dolben; and so judgment was given for the plaintiff, for the son hath benefit by having of the wood, and the daughter hath lost her portion by this means. And now Jones said, he must confess he was never well satisfied with the judgment in *Norris & Pine's case*; but being it was resolved, he was loth to give his opinion so suddenly against it. And *nota*, upon this judgment error was immediately brought; and Trin. 31 Car. II, it was affirmed in the Exchequer-Chamber.¹⁵

¹⁵ See Sir T. R. 302.

Notwithstanding that this is a decision of the Exchequer Chamber it is clearly no longer law in England. See *per* Wightman, Crompton and Blackburn, J. J., in *Tweddle v. Atkinson*, (1861) 1 B. & S. 393. The modern rule is that no stranger to the consideration can take advantage of a contract, although made for his benefit.

It may perhaps be worth while to append to these cases for purposes of comparison the definition of "valuable consideration" given in the Exchequer Chamber in *Currie v. Misa*, (1875) 44 L. J. Ex. 94—the modern "locus classicus" on the subject:

"A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other."

There are other matters which might be dwelt upon in the cases during the period under discussion—such as the relative fields of the actions of *debt* and *assumpsit* and the like—but they are, as a rule, of too technical a character to be of much profit to a modern lawyer. I must say, in conclusion, that I am most grateful to my historical friend for suggesting to me this task. I have found it very interesting. The period in question is probably not of so great interest to an historian as the earlier periods dealt with by such students as Maitland, Pollock and Holdsworth in this country. To a lawyer, however, it is of quite equal interest; as it is a time when legal ideas are beginning to emancipate themselves from legal forms, and, under the influence of such great intellects as Chief Justices Holt and Hale, are beginning to assume definite and logical form. Anyone who reads the cases set forth above, will I think, be struck with the *modern* way in which the legal questions are handled. I do not apologize for setting the cases out at length. I am more convinced every day that no one can really understand the English Common Law until he knows something about the English forms of action and their history, and that the first thing to be done in reading an old case is to find out exactly what the form of action is, and why that form was adopted.

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